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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON  
AT SPOKANE

In re METROPOLITAN SECURITIES  
LITIGATION

No. CV-04-0025-FVS

THIS DOCUMENT RELATES TO:  
ALL ACTIONS

PLAINTIFFS' MEMORANDUM  
IN SUPPORT OF MOTION *IN  
LIMINE* TO CONFIRM "SUIT  
DATE" AS DECEMBER 17, 2004

Hearing Date: March 3, 2010  
Time: 9:00 a.m.

I. INTRODUCTION

In connection with the cross motions for summary judgment on negative causation, Plaintiffs argued that the correct "suit date" for the purposes of calculating damages against PwC in this case for assessing damages and loss-

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causation issues is December 17, 2004, the day claims were first filed against PwC. The Court did not reach the issue in its ruling denying the parties' respective motions for summary judgment. However, Plaintiffs believe the resolution of the issue is important to resolve prior to trial, and therefore request that the Court rule *in limine* that the "suit date" for the purpose of Plaintiffs' claims against PwC is December 17, 2004.

## II. ARGUMENT

### A. Section 11 Measures Damages As of the Date Plaintiff Filed A Claim Against a Defendant

Section 11 damages are the difference between the security's purchase price and its value "as of the time such suit was brought ...." 15 U.S.C. § 77k(e). The "time such suit was brought" refers to the date a suit authorized under subsection 11(a) was filed. For PwC, that date is December 17, 2004, the date that PwC was first added as a defendant, (Ct. Rec. 150, attachments 1-13), in the Consolidated Amended Complaint, not January 20, 2004, the date the first complaint in this case was filed. The December 17, 2004 Complaint asserted the first § 11 claim against PwC, *id.* at 109-13. This was the initial claim against PwC and does not relate back to an earlier complaint.

PwC nonetheless made clear in prior filings (and at oral argument on summary judgment) that it believes the proper suit date is January 20, 2004 – *before* Plaintiffs named PwC as a defendant and before Plaintiffs had even alleged a Section 11 claim against any party. To Plaintiffs' knowledge, no court has ever found that the § 11 suit date as to a particular defendant was a date *before the*

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1      *defendant was added to the lawsuit and where the new complaint did not relate*  
 2      *back to an earlier filing.*

3            Complex securities scams do not necessarily fully reveal themselves to the  
 4      public at once. More typically, the scam is unveiled piecemeal via a series of  
 5      public disclosures or by the materialization of previously concealed risks. Parties  
 6      responsible for a false or misleading registration statement thus may be named as  
 7      § 11 defendants at different times, in response to different disclosures or events.  
 8            For example, if the first public disclosure of misstatements in a registration  
 9      statement does not implicate the statement's financial reports, the § 11 plaintiff  
 10     would not have grounds to name the issuer's auditor as a defendant in the initial  
 11     § 11 claim. But if subsequent disclosures or events trigger additional losses by  
 12     exposing errors in the financial reports, the plaintiff might extend the § 11 claim to  
 13     the auditor.

14            PwC's position would immunize culpable auditors from § 11 liability in  
 15     such a case and create a conflict between the securities law and the Federal Rules  
 16     of Civil Procedure. If the initial complaint's filing date governed the calculation of  
 17     § 11 damages as to all defendants, even for subsequent losses attributable to the  
 18     acts of subsequently named defendants, those subsequently named defendants  
 19     would evade liability even though their actions caused the loss in value. The law  
 20     does not grant this sweeping immunity to securities violators.

21            PwC's contrived reading of § 11 is contrary to the Security Act's remedial  
 22     purpose of protecting public investors from serious abuses in the securities market,  
 23

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1 *see, e.g., SEC v. W. J. Howey Co.*, 328 U.S. 293, 301 (1946) (Securities Act's  
 2 "statutory policy" is "affording broad protection to investors"); *Reves v. Ernst &*  
 3 *Young*, 494 U.S. 56, 60 (1990). This remedial purpose will not allow interpretation  
 4 of § 11 in such a contrived manner as to grant PwC immunity simply because  
 5 different plaintiffs<sup>1</sup> filed different claims against different defendants on January  
 6 20, 2004.

8 PwC's position also ignores the relevant relation-back principles. Only  
 9 under narrow, and inapplicable, circumstances of notice and mistake regarding the  
 10 identity of closely related parties do courts allow a claim to relate back to a prior  
 11 claim filed against a different defendant. *See, e.g., Nelson v. Adams USA*, 529 U.S.  
 12 460, 467 n.1, 471 (2000); *Schiavone v. Fortune*, 477 U.S. 21, 31 (1986);  
 13 *Eaglesmith v. Ward*, 73 F.3d 857, 860 (9th Cir. 1995); *Kilkenny v. Arco Marine,*  
 14 *Inc.*, 800 F.2d 853, 857 (9th Cir. 1986). *See also Westport Ins. Corp. v. Markham*  
 15 *Group, Inc.*, 2009 U.S. Dist. LEXIS 76877, at \*15-16 n.4 (E.D. Wash. Aug. 26,  
 16 2009); *Bower v. Bunker Hill Co.*, 675 F. Supp. 1254, 1257 (E.D. Wash. 1986).  
 17 PwC suggests no grounds for the § 11 claims against them to relate back to  
 18 complaints that did not name them. And for good reason; if Plaintiffs' claims  
 19  
 20  
 21  
 22

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23 <sup>1</sup> None of the three groups of plaintiffs that filed the initial complaint on  
 24 January 20, 2004, and the First Amended Complaint on January 30, 2004,  
 25 continued as named plaintiffs in the December 27, 2004 complaint.  
 26

1 related back to January 20, 2004, then PwC would face potential liability for  
 2 millions of dollars in additional securities.

3 There is, accordingly, no basis to place the Securities Act and Rule 15(c) in  
 4 conflict and extend immunity for § 11 violations to later-added defendants. Sound  
 5 analysis and authority compel rejection of PwC's position.  
 6

7 **B. The Cases Cited By PwC at Oral Argument are Inapposite**

8 At oral argument on January 5, 2010, PwC's counsel cited three authorities  
 9 in response to Plaintiffs' argument regarding the correct "suit date" in this case. A  
 10 review of PwC's authorities demonstrates that they do not effectively rebut  
 11 Plaintiffs' analysis that relation-back principles indicate that while a § 11 claim can  
 12 relate back to an earlier, similar claim against the same defendant, such a claim  
 13 cannot relate back to a subsequently added defendant.  
 14

15 In *Alpern v. UtiliCorp United*, 84 F.3d 1525, 1543 (8th Cir. 1996), the Court  
 16 expressly relied on relation-back principles under Rule 15(c)(2) in finding that a  
 17 later-filed § 11 claim related back to a § 10 claim because it "was based on the  
 18 same transactions, occurrences, and conduct alleged in the original complaint."  
 19 The decision contains no suggestion that the related-back § 11 claim applied to  
 20 newly added defendants, or that amended complaints added new defendants at all.  
 21 *Alpern* is consistent with Plaintiffs' argument.  
 22

23 In *Beecher v. Able*, 435 F. Supp. 397, 402 (S.D.N.Y. 1975), the court chose  
 24 as the suit date the date that the first of three consolidated § 11 claims was filed.  
 25 The court explained that the entire class had been contemplated at the time the first  
 26

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1 action was filed and that using that filing date could minimize date shopping in  
 2 future cases, thereby limiting multiple identical suits. *Id.* Because of the  
 3 circumstances of that case, which apparently did not include the addition of  
 4 defendants in a later complaint, the court did not need to consider relation-back  
 5 principles. The case is simply inapposite.

7       *In re AFC Enters. Sec. Litig.*, 348 F. Supp. 2d 1363, 1379 (N.D. Ga. 2004)  
 8 arguably supports defendants' position, in that the district court ruled that the suit  
 9 date was the date of the initial complaint for all defendants, including later-added  
 10 ones. The court purported to rely on *Alpern*, but apparently failed to consider  
 11 whether the relation-back principles applied in *Alpern* were appropriate in the case  
 12 of later-added defendants. By nominally applying but implicitly revising the  
 13 relation-back rules in the context of § 11 standing, the court needlessly created a  
 14 quagmire of conflicting law that this Court should not follow.

16       In addition, Plaintiffs note that if PwC actually argues that the Complaint  
 17 filed on December 17, 2004, should relate back to the Complaint filed on January  
 18 20, 2004, then the tolling of the statute of limitations also should relate back to the  
 19 original complaint. If that were the case, it would constitute a basis for reversing  
 20 the Court's statute-of-limitations summary judgment Order dated February 8,  
 21 2010. There is simply no logical or rule-based analysis that calls for entirely  
 22 different approaches between relation back for tolling purposes and relation back  
 23 for "suit date" purposes under § 11.  
 24  
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**C. Plaintiffs' Prior Assumptions That the Suit Date Was January 20, 2004 Are Not Dispositive**

At oral argument regarding the motions for summary judgment, PwC contended that Plaintiffs should not be allowed to make arguments about a suit date other than January 20, 2004, because they did not previously dispute whether that was the correct suit date. Plaintiffs recognize they have filed briefs with the Court in which they stated that appropriate date was January 20, 2004, but that issue was not previously in dispute, and Plaintiffs only recently realized the issue, but even then Plaintiffs raised it four months prior to trial. There is no basis for any argument that Plaintiffs should be estopped from raising the issue.

### III. CONCLUSION

For the reasons stated above, Plaintiffs request that the Court rule that the “suit date” for the purposes of this case is December 17, 2004.

Dated this 16th day of February, 2010.

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1                   **CERTIFICATE OF SERVICE**

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 3 attorney of record for each other party via email on February 16, 2010 to the  
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